

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALONZO D. WELLS
Claimant

VS.

CON-WAY FREIGHT, INC.
Respondent

AND

**INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA**
Insurance Carrier

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Docket No. 1,048,118

ORDER

Respondent and its insurance carrier (respondent) request review of the February 23, 2010 Preliminary Decision entered by Administrative Law Judge (ALJ) Marcia L. Yates Roberts.

ISSUES

In the February 23, 2010 Preliminary Decision, the ALJ found the claimant was involved in an incident at work on October 22, 2009, that resulted in a fall in a trailer that was being moved. The ALJ concluded claimant was entitled to medical treatment.

The respondent requests the Preliminary Decision be reversed and medical treatment be denied.¹ First, the respondent alleges the claimant's testimony is inconsistent and lacks credibility. Second, the respondent alleges the injuries sustained by claimant were a result of a purposeful act on the behalf of the claimant and as such compensation should be disallowed pursuant to K.S.A. 44-501(d)(1). Lastly, respondent asserts the ALJ exceeded her authority in granting benefits.

The claimant requests that the Preliminary Decision be affirmed.

¹ The ALJ authorized Dr. Appelbaum to evaluate claimant's head injury. The ALJ also appointed Dr. Terrence Pratt to evaluate claimant's alleged bilateral shoulder injuries and to specifically address causation and recommendations for medical treatment.

The issues are:

- Whether claimant's alleged injury arose out of and in the course of his employment with the respondent.
- Whether the injury was the result of a purposeful act on behalf of the claimant.
- Whether the ALJ exceeded her authority in granting benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant started working for respondent in August 2009 as a driver. In addition to driving a truck, claimant's responsibilities included unloading trailers.

The following, as gleaned from the record compiled to date, sets out the normal dock procedures for unloading trailers for the respondent. The trailer is backed up to the dock. A wheel chock is then placed under one of the wheels to keep the trailer from moving. The freight is unloaded and the trailer is swept out to prepare for reloading. When the trailer is ready to be pulled, the dock plate is moved, the door of the trailer is closed and the break sheet is given to the supervisor, who radios a hostler driver to move the trailer. A hostler buggy is backed under the trailer and hooked up. Air lines must also be hooked up to release the brakes. The hostler driver then walks to the back of the truck to pull the wheel chock, which is placed on the dock to alert others that the trailer is ready to move.

On October 22, 2009, claimant was working on the dock unloading a trailer. He testified that his supervisor approached him and asked him to hurry up and finish with the trailer so the supervisor could call the trailer to be moved.² The normal procedure would be to hand the break sheet to the supervisor when unloading and sweeping of the trailer was complete. On the day in question the claimant departed from normal procedure and handed his supervisor the break sheet before the sweeping of the trailer was complete. When claimant handed the break sheet to his supervisor, his supervisor said to come see him when the job was complete.³ According to claimant's testimony, within a few minutes

² P.H. Trans. at 6.

³ *Id.*, at 7.

the hostler driver hooked up the trailer to the hostler buggy while claimant was still in the trailer and drove away from the dock.⁴ The driver of the hostler buggy first made a left turn that caused the claimant to fall to the side of the trailer. As the buggy and trailer were moving out into the yard another truck driver saw claimant in the back of the trailer and blew his air horn to alert the hostler driver. This caused the hostler driver to stop, causing the claimant to strike the front of the trailer, which rendered him unconscious.⁵

The claimant was transported by ambulance to the University of Kansas Hospital emergency room. The claimant regained consciousness in the ambulance and ambulance personnel advised claimant he had been unconscious for about 20 to 30 minutes.

Claimant was treated in the University of Kansas Hospital emergency room, given pain medication and released. The emergency room records reflect the claimant was diagnosed with a concussion with loss of consciousness of unspecified duration.⁶

Claimant testified that after he regained consciousness he had a very bad headache.⁷ The next morning he felt pain in his low back and both shoulders and he experienced blurry vision and continued to have headaches.⁸

Claimant was treated by company physician Dr. L. John Larson, who ordered physical therapy. According to claimant, the doctor diagnosed him as having post-concussive syndrome. Claimant was ultimately referred to Dr. James S. Appelbaum, a neurologist, and Dr. Charlie Rhoades, an orthopedic doctor.

Claimant continues to work for respondent on light duty. Although claimant was scheduled for 8 hours a day he only was able to work 4 to 5 hours a day due to headaches and sensitive eyes.⁹ Dr. Larson suggested claimant wear sunglasses all the time due to claimant's photophobia.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*, Cl. Ex. 1 at 3.

⁷ *Id.*, at 9.

⁸ *Id.*, at 10.

⁹ *Id.*, at 12.

Claimant testified he considered his job with respondent a good job for good pay and that he intended to retire from the job. Claimant denies purposefully throwing himself against the trailer to sustain injury.¹⁰

Five employees of the respondent testified on the behalf of the respondent – the claimant’s supervisor; the driver of the hostler buggy; the driver who blew the air horn; a co-worker who witnessed the trailer pulling away from the dock; and a co-worker, a former military medic, who provided medical assistance to claimant before the ambulance arrived on the scene. Respondent contends the ALJ failed to properly consider the testimony of the five witnesses. The testimony of the witnesses is inconsistent and often contradictory. The witnesses were inconsistent on many pertinent facts surrounding the accident – the speed the hostler buggy was being driven, whether or not a broom was in the trailer, whether claimant was found face down in the trailer or lying on his back, whether the trailer was clean or full of debris, the size of the trailer and the time line. The ALJ’s weighing of this testimony is reasonable.

The respondent challenges the credibility of the claimant by presenting a surveillance tape allegedly showing the claimant not wearing sunglasses per Dr. Larson’s suggestion. The quality of some of the tape is quite poor, making it difficult to determine whether the claimant had on sunglasses. Although the tape does show times when claimant was not wearing sunglasses, based on the totality of the evidence compiled to date, the tape has little probative value and does not impeach the credibility of the claimant.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹¹ Whether an accident arises out of and in the course of the worker’s employment depends upon the facts peculiar to the particular case.¹²

The two phrases arising “out of” and “in the course of” employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase ‘out of’ employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises ‘out of’ employment when there is apparent to the

¹⁰ *Id.*, at 13.

¹¹ K.S.A. 2009 Supp. 44-501(a).

¹² *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹³

Based on the evidence compiled to date, this Board Member concurs with the ALJ's implicit finding that the claimant's accident arose out of and in the course of his employment with the respondent as to the head injury. The ALJ has not determined the causation issue as to the bilateral shoulder injuries so this Board Member will not and cannot address the causation as to the bilateral shoulder injuries.

The respondent's allegation that claimant intentionally remained in the trailer and then threw himself about the trailer while it was moving is not logical. Respondent presented no reasonable motive to support the allegation. Absent a motive, the argument is not persuasive.

K.S.A. 44-534a grants authority to the ALJ to decide issues concerning furnishing medical treatment. Thus, the ALJ did not exceed her jurisdiction as alleged by the respondent.

After reviewing the briefs, the administrative record and the record compiled to date, this Board Member finds no reason to disturb the Preliminary Decision of the ALJ.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, this Board Member hereby affirms the Preliminary Decision of ALJ Marcia L. Yates Roberts issued on February 23, 2010.

IT IS SO ORDERED.

¹³ *Id.*, at 278.

¹⁴ K.S.A. 44-534a.

Dated this ____ day of April, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Kathleen A. McNamara, Attorney for Claimant
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge